Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1993

J.Z.G. RESOURCES, INC.,
Petitioner,

vs.

SHELBY INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. When a trial in U.S. District Court is limited to certain specified issues and defenses, and the Court of Appeals, *after oral argument*, raises, *sua sponte*, a new defense that was never asserted or tried in the District Court or argued by the parties on appeal, and the applicability of that defense is dependent on factual determinations which were never made, or even considered, by the District Court (since those facts were not relevant to the limited issues that were actually being tried):

a. Does the Due Process Clause permit the Court of Appeals to decide that new defense adversely to the plaintiff-appellee solely on the basis of evidence that was presented to the District Court with respect to the limited issues that were before that Court, and without giving plaintiff-appellee notice and an opportunity to be heard with respect to that new defense; or

b. Does the Due Process Clause require that the case be remanded to the District Court in order to afford the plaintiff an opportunity to present evidence with respect to that new defense and have the District Court make findings as to whether the facts render that new defense applicable or inapplicable?

LIST OF PARTIES

A. Petitioner:
J.Z.G. Resources, Inc.

B. Respondent:
Shelby Insurance Company

C. Additional Parties Below:
Edward E. King,
C. James Osborne, Jr., and
R.L.S., P.C.

RULE 29.1 STATEMENT

J.Z.G. Resources, Inc. is a corporation with no parent or subsidiary corporations.

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PETITION FOR WRIT OF CERTIORARI

REFERENCES TO PRIOR OPINIONS IN THIS CASE

The opinion of the United States Court of Appeals for the Second Circuit, issued on February 26, 1993, is reported in *J.Z.G. Resources, Inc. v. King, et al.*, 987 F.2d 98 (2nd Cir. 1993). The Court of Appeals' Opinion and its Order denying Petitioner's Petition for Rehearing, issued on July 8, 1993, are reprinted in Appendices A and D, respectively. The Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of New York, issued on December 27, 1991, and the Memorandum and Decision issued by that Court on December 5, 1991, with respect to Plaintiff's Motion *in Limine*, are reprinted in Appendices B and C, respectively.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Second Circuit initially issued its Opinion on February 26, 1993, and denied Petitioner's Petition for Rehearing on July 8, 1993. Pursuant to 28 U.S.C. §2101(c), Petitioner has applied for this writ of certiorari within ninety days after the Court of Appeals overruled Petitioner's motion for rehearing. Therefore, this Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION AT ISSUE

No persons shall be . . . deprived of life, liberty, or property, without due process of law; . . . .

U.S. CONST. amend. V.

STATEMENT OF THE CASE

In 1990, Petitioner J.Z.G. Resources, Inc., a real estate development company, brought suit in the United States District Court for the Southern District of New York against a road-building contractor (Edward E. King) and the contractor's liability insurer, Shelby Insurance Company ("Respondent Shelby"). Federal jurisdiction was based on diversity of citizenship.

The Complaint alleged that defendant King had been employed to construct access roads and storm drainage facilities for Petitioner's residential development in the Town of Southeast, New York; that King performed the work in a negligent manner in that the roads were built in the wrong locations, were badly tilted and had improper grades and elevations, and failed to conform to the specifications that had been approved by the Town. The Complaint further alleged that, as a result of the negligent construction of the roads, the drainage systems (which had been previously installed and paid for) no longer worked properly and various lots owned by Petitioner within the development were being damaged.

After a bench trial in December, 1991, the District Court held that King had been negligent in the manner alleged and that he was liable to Petitioner for the cost of removing and redoing the roads. Judgment was therefore rendered against King in the amount of $350,000.

The claim against King's liability insurer, Respondent Shelby, was based on the provisions of the comprehensive general liability ("CGL") policy issued by Shelby to King, which specifically stated that Shelby would indemnify King against liability for "property

damage *** arising out of your product or your work, except; *** (2) [w]ork that has not been completed or abandoned."[1]

Shelby, in its Answer, took the position that its policy did not cover Petitioner's claim because of several specific policy exclusions. However, prior to trial, after several motions, the District Court concluded that Shelby had abandoned its reliance on all of these policy exclusions *except two.* Therefore, on December 5, 1991, the District Court issued an order in *limine* limiting the trial on Shelby's liability to those two exclusions (See Appendix C).

The first of these two exclusions was the "work that has not been completed" exception to the Products/Completed Operations coverage quoted above. In its post-trial Findings of Fact and Conclusions of Law, dated December 27, 1991, the District Court rejected Shelby's argument and specifically held that King's work had been "completed."

The second policy exclusion relied upon by Shelby at trial was exclusion "L", which excluded "property damage to your work arising out of it or any part of it and included in the products/completed operations hazard." The District court deemed this exclusion to be inapplicable to Petitioner's claim. Accordingly, the District Court held that Shelby was liable to Petitioner for the limits of its policy ($300,000), and entered judgment against Shelby in that amount (Appendix B).

Both King and Shelby appealed to the Second Circuit. Shelby's appeal focused on the issue of whether or not King's work had been "completed" within the

[1] This particular type of coverage is known as "Products/Completed Operations Liability Coverage."

meaning of the exception to the Products/Completed Operations coverage. Significantly, Shelby did *not* challenge the District Court's rejection of its exclusion "L" defense.

In its opinion, issued on Feberuary 26, 1993, the Second Circuit agreed with the District Court's conclusion that none of the defenses that had been asserted by Shelby were applicable to Petitioner's claim. Nevertheless, while affirming the judgment that had been entered against the contractor (King), the Second Circuit *reversed* the judgment that had been entered against Shelby and ordered the District Court to dismiss the Complaint as to Shelby. That decision was based on an *entirely new defense* that had never been asserted by Shelby, either in the District Court or in the Court of Appeals, but which was raised by the Court of Appeals itself, *sua sponte, after oral argument.* Indeed, the first knowledge that Petitioner had of this defense was when Petitioner read it in the Court of Appeals' Opinion, where the issue was simultaneously (a) introduced by the Court of Appeals, (b) discussed by the Court of Appeals, and (c) made the sole basis for a reversal of the District Court's judgment against Shelby.

The issue that the Court of Appeals raised, *sua sponte*—and then decided adversely to Petitioner—was whether a CGL policy issued to a contractor provides coverage for a claim for the cost of repairing the contractor's faulty workmanship where the only property that was damaged by the faulty workmanship was the contractor's own "work product". The Second Circuit concluded that, as a general proposition, CGL policies do not cover such claims and only cover claims for damage to property "other than to the *** completed work itself." Assuming, *arguendo,* that this is a correct

interpretation of CGL policies and one which is consistent with New York law, the Second Circuit, at this point, made a *critical procedural error:* rather than asking the parties to comment on whether any such damage to "other property" had in fact occurred in the instant case (a question that had never been posed in either the District Court or in the Court of Appeals), or remanding the case to the District Court for factual findings on that issue, the Second Circuit determined, *on its own,* that no such damage had occurred in the instant case—and that Shelby was therefore not liable to Petitioner:

> "JZG seeks recovery from King only for the repair of the faulty roads that King constructed at Peach Brook Farms. Because the policy does not provide coverage to King for this liability to JZG, Shelby is not liable to JZG for the judgment entered in favor of JZG against King."

Petitioner then petitioned the Second Circuit for a rehearing, arguing that the Court of Appeals should have remanded the case to the District Court for a factual determination as to whether the negligence of King had caused damage to property other than the roads themselves. Had the Court of Appeals ordered such a remand, the result would have been the opposite of that which was decreed by the Second Circuit. Indeed, Petitioner's Complaint specifically alleged that the improper location and grading of the roads resulted in *damage to adjoining lots* within the development (Complaint, paragraphs 10, 11, 12 and 18). Since, however, the District Court had specifically limited the defenses to be tried to (a) whether King's work had been "completed" and (b) exclusion "L", *Petitioner did not present at trial any evidence with respect to the other property damage,* inasmuch as most of such damage

would be cured if the defective roads are replaced. If, therefore, the Second Circuit had ordered a remand with respect to this issue, Petitioner would have had the opportunity to present evidence as to the nature and extent of "other property" damage which had occurred as a result of King's negligence, including, in particular, the damage which had been caused to other lots owned by Petitioner. Such evidence would have confirmed Shelby's liability under the policy.

However, on July 8, 1993 the Court of Appeals rejected the petition for rehearing.

ARGUMENT

The Refusal Of The Second Circuit To Order A Remand So That The District Court Could Receive Evidence And Make Factual Findings With Respect To The New Defense Raised, *Sua Sponte*, By The Second Circuit After Oral Argument Permanently Deprived Petitioner Of Its Property Without Due Process Of Law.

The First Circuit has held that a United States Court of Appeals should not raise a new issue on its own unless it is "convinced, at a minimum, that not raising the issue would result in a gross miscarraige of justice and that raising the issue would virtually ensure the success of the party on whose behalf the issue is being raised." *Whyte v. Connecticut Mutual Life Insurance Co.*, 818 F.2d 1005, 1011 (1st Cir. 1987).

Other Circuits have held that arguments raised for the first time on appeal may be considered "where the newly raised issue is a purely legal one which does not depend on the factual record developed below or the pertinent record has been fully developed." *Pacific Express, Inc. v. United Airlines, Inc.*, 959 F.2d 814, 819 (9th Cir. 1992).

Accord: Texas Rural Legal Aid v. Legal Services Corp., 940 F.2d 685, 697 (D.C. Cir. 1991), holding that, in exercising its discretion to take up questions raised for the first time on appeal, the Court of Appeals will

> "look to factors such as whether the issue in question has been fully briefed by the parties and whether decision of the issue would be aided by the development of a factual record in the district court."

Hence, in cases such as this where the newly raised issue has *not* been fully briefed by the parties and the presentation of evidence in the district court related to other issues, it would seem that due process would require, *at a minimum*, remand to the district court for development of a factual record. *Compare United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978), where the Ninth Circuit pointed out that, in a situation "where a new theory or issue has first come to light during the pendency of the appeal," a remand "for further findings of fact and to give the parties a chance to develop their arguments in light of a new theory or issue may be required."

The Second Circuit, however—in stark contrast to the procedures recommended by other circuits—refused to even consider a remand in the instant case. Instead the Second Circuit raised a new defense, *sua sponte*, after oral argument, and then decided that defense adversely to the party that had prevailed below without affording that party any opportunity to brief the issue or demonstrate that the actual facts were such as to render the new defense inapplicable. As pointed out in the Statement of the Case above, had the Second Circuit ordered a remand and directed the District Court to make factual findings as to whether, in fact, "other property" had been damaged by King's negligence (as, indeed, Petitioner's Complaint had alleged), the end result would have been exactly the *opposite* of that which was decreed by the Second Circuit.

It is therefore manifest that the procedure followed by the Second Circuit deprived Petitioner of its property (*i.e.*, its judgment against Shelby) without due process of law.

CONCLUSION

For the reasons set forth above, Petitioner requests that this Court grant a Writ of Certiorari to review the Judgment of the Second Circuit.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

(Decided February 26, 1993)

Docket Nos. 92-7178, 92-7208, 92-7210

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 183, 185, 311—August Term, 1992
(Argued: September 24, 1992
Decided: February 26, 1993)

J.Z.G. RESOURCES, INC.,
Plaintiff-Appellee-
Cross-Appellant,

against

EDWARD E. KING and SHELBY INSURANCE CO.,
Defendants-Appellants-
Cross-Appellees,

C. JAMES OSBORNE, JR., R.L.S., P.C.,
Defendant.

Before: NEWMAN, WINTER, and MAHONEY,
Circuit Judges.

Appeals and cross-appeal from a judgment of the United States District Court for the Southern District of New York entered January 22, 1992, Gerard L. Goettel, *Judge*, in favor of J.Z.G. Resources, Inc. against Edward E. King for $400,000, and against Shelby Insurance Co. for $300,000.

Affirmed as to Edward E. King; reversed as to Shelby Insurance Co.

MARK G. BARRETT, White Plains, New York (Boeggeman, George, Jannace & Hodges, P.C., White Plains, New York, of counsel), for *Defendant-Appellant-Cross-Appellee Edward E. King.*

JAMES DONOHUE, White Plains, New York (Harold Merran, Donohue & Locker, White Plains, New York, of counsel), for *Defendant-Appellant-Cross-Appellee Shelby Insurance Co.*

ALAN D. SINGER, White Plains, New York (Mark D. Ginsburg, Davis and Singer, P.C., White Plains, New York, of counsel), for *Plaintiff-Appellee-Cross-Appellant.*

MAHONEY, *Circuit Judge:*

The appeals and cross-appeal in this case are taken from a judgment of the United States District Court for the Southern District of New York entered January 22, 1992, Gerard L. Goettel, *Judge*, in favor of plaintiff-appellee-cross-appellant J.Z.G. Resources, Inc. ("JZG") against defendant-appellant-cross-appellee Edward E. King for $400,000, and against defendant-appellant-cross-appellee Shelby Insurance Co. ("Shelby") for $300,000. The judgment also dismissed the complaint against defendant C. James Osborne, Jr., R.L.S., P.C. ("Osborne P.C.").

King and Shelby appeal the judgments against them. JZG cross-appeals from the judgment insofar as it limits its recovery against Shelby to $300,000 and denies prejudgment interest. No appeal is taken from the dismissal of JZG's complaint against Osborne P.C.

We reverse the judgment against Shelby and affirm in all other respects.

Background

JZG, a New York corporation, is a residential real estate development company that owns a parcel of land in the Town of Southeast, Putnam County, New York (the "Town") on which there is a development known as Peach Brook Farms. King, doing business as E.E. King Co., is an excavation and road building contractor. Shelby is an Ohio corporation authorized to write policies of liability insurance in the State of Connecticut. Subject matter jurisdiction in this case is premised upon diversity of citizenship pursuant to 28 U.S.C. §1332 (1988).

King had a commercial general liability ("CGL") insurance policy (the "Policy") with Shelby which included products-completed operations hazard ("PCOH") coverage. The Policy provided coverage from July 30, 1988 to July 30, 1989, but was cancelled on December 5, 1988 because of King's failure to pay premiums.

On April 27, 1988, JZG entered into a contract with King (the "Contract"), under which King agreed to construct and install three subdivision roads in the Peach Brook Farms development. The roads were to be named Peach Brook Lane, Fair Meadow Drive, and St. James Place. After the roads were completed and approved by the Town, they were to be dedicated to the Town.

King agreed in the Contract that all work would be in conformity with JZG's plans and would meet or exceed the requirements and specifications of the Town and the State of New York. King also guaranteed the work for one year and agreed to indemnify JZG for any attorney fees that JZG might incur as a result of a breach of the Contract by King. In addition, King agreed to "maintain and pay for Workmen's Compensation and public liability insurance, property damage, completed operations or product liability insurance and such other insurance as required by (*inter alia*, JZG)." The Contract further provided that JZG was to be "list[ed] . . . as an additional insured on a certificate of insurance for liability coverage."

King had visited the site before entering into the Contract, at which time construction access roads had been cleared in order for heavy equipment to enter the area, and stakings had been placed to indicate where the actual roads were to be located. These stakings had been placed in October 1987 by Robert H. Bergendorff, a licensed surveyor, at the direction of JZG. Although it was contested at trial whether the stakes indicated the proper roadway elevations, the district court found that they did not, and that the elevation information was only available in documents in Bergendorff's possession known as "cut sheets."

King commenced construction of the roads in July 1988, relying solely upon the stakes for the proper elevation of the roadways. In August of that year, Richard Palmer, the Town highway superintendent, asked King for a survey that would confirm that the roads as built conformed to the plans approved by the Town. King employed Stephen Osborne, a cousin of one of his employees, to do the survey. Although Stephen

Osborne was an employee of Osborne, P.C., a licensed surveyor, he was not licensed to survey. It was contested at trial whether Stephen Osborne advised King that there were elevation problems, as Osborne contended, or did not, as King maintained. In any event, King delivered to Palmer a letter on the stationery of Osborne P.C., purportedly signed by C. James Osborne, Jr., which indicated that the road locations and elevations were proper. In fact, King forged the Osborne signature and later pled guilty to a criminal charge relating to the forgery. The letter, however, prompted Palmer to permit King to pave the roads.

By the spring of 1989, King had finished the road work except for the top coat and curbing. He then informed JZG that he had suffered substantial financial reversals and could not complete the remaining work required by the Contract. In order to complete the job, JZG called in another contractor that commissioned its own survey and discovered that the roads laid by King varied significantly from the pertinent specifications. The surveyor reported that one road was out of place, the elevations were seriously amiss for two of the roads, and some of the roads were badly tilted to the side.

Meanwhile, approximately six homes had been constructed in the development and had been issued certificates of occupancy by the Town, and the roads in question were being used regularly by motorists. However, the Town refused to accept the roads for dedication, and accordingly refused to assume responsibility for maintenance and snow removal until the deficiencies in the roads had been corrected and the roads conformed to the specifications in the plans the Town had approved. Negotiations between JZG and the Town concerning a possible compromise were fruitless.

JZG subsequently commenced this action against King, claiming breach of contract and negligence; Osborne P.C., claiming negligent surveying; and Shelby, claiming that King had obtained CGL and PCOH insurance from Shelby in which JZG was a named insured. JZG sought a "minimum" of $350,000 damages from all defendants on all claims, and an additional "minimum" of $50,000 on its contract claim against King for attorney fees.

In findings of fact and conclusions of law entered December 30, 1991, the district court determined that King was negligent in installing all the roadways at improper grades and elevations and one road in the wrong location, and accordingly found King liable for the cost of removing and reconstructing the roads to put them in acceptable condition for acceptance by the Town. The court determined the resulting damages to be $350,000, and added $50,000 on the contract claim against King for attorney fees. The court dismissed the claim against Osborne P.C., finding no privity between JZG and Osborne P.C., and no basis for a claim of negligent misrepresentation against Osborne P.C. Deeming JZG's claim against Shelby "the most difficult aspect of this case," the court determined Shelby to be "liable for the limit of its liability, namely $300,000." In a subsequent memorandum decision entered February 26, 1992, the district court denied JZG's postjudgment application for prejudgment interest.

Appeals by King and Shelby, and a cross-appeal by JZG, then ensued.

Discussion

We affirm the district court's denial of prejudgment interest substantially for the reasons stated in that court's memorandum decision entered February 26, 1922,

including JZG's failure to make any application for prejudgment interest until after judgment in its favor had been entered. We rely upon the district court's findings of fact and conclusions of law with respect to, and affirm, all other aspects of the judgment on appeal[1] except the determination that Shelby was liable to JZG for $300,000 pursuant to the Policy. The balance of this opinion will address only the issue of Shelby's liability.

JZG named Shelby as a defendant on the basis, as pleaded in JZG's complaint, that (1) the Contract required King to obtain CGL insurance that included PCOH coverage and named JZG as an insured, and (2) Shelby provided a certificate of insurance to JZG which stated that this had been done. Although the Contract contained such a requirement, however, JZG was not in fact named as an insured in the Policy, and the certificate of insurance provided by King to JZG did not name JZG as an insured.

It is undisputed, however, that if Shelby were required to indemnify King under the Policy for King's liability to JZG, the indemnification would inure to the

---

[1] King contends on appeal that any award to JZG must be reduced by the balance outstanding to him from JZG on the Contract. The district court found, however, that "King was paid for the work he had done to [the] date" when he terminated performance under the Contract. This finding is not clearly erroneous. We note that King made a conclusory claim in his initial appeal brief that only $143,860.13 had been paid to him on the total Contract price of $236,000.00. JZG responded that: (1) the same trial exhibit upon which King relied for the $143,860.13 figure showed additional payments of $45,966.01 to third parties on King's behalf against total invoices of $180,477.93; and (2) King was raising the underpayment issue for the first time on appeal. Although JZG's contention appears to be a fair reading of the pertinent trial exhibit, King's reply brief did not respond to these arguments, but simply asserted that *he* had been paid only $143,860.13 on invoices totalling $180,477.73.

benefit of JZG. Indeed, the Policy explicitly provides that: "A person or organization may sue [the insurer] to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial. . . ." Further, New York law expressly requires the inclusion of such a provision in any policy of liability insurance. *See* N.Y. Ins. Law §3420(a)(2) (McKinney 1985). We therefore proceed to the merits of the issue of insurance coverage.

As stated earlier, the Policy is a CGL policy with added PCOH coverage. Its basic coverage is for bodily injury and property damage for which King, the insured, might become liable to third parties. Obviously, the issue in this case is property damage rather than bodily injury. Although the parties did not brief the issue, the court inquired at oral argument whether the roads laid by King at Peach Brook Farms had suffered "property damage" as defined in the Policy, to wit:

> a. Physical injury to tangible property, including all resulting loss of use of that property; or
>
> b. Loss of use of tangible property that is not physically injured.

We do not regard the improper grades, elevations, and location at issue in this case as constituting "physical injury" to the roads. Further, the roads have certainly been put to use by the drivers who traverse them. The Town's refusal to accept the roads for dedication and undertake responsibility for maintenance and snow removal, however, would appear to result in a significant impairment of the roads' intended use by JZG. We will assume that there has been property damage under the Policy in the sense of "[l]oss of use of tangible property," although the question is not free from doubt.

The Policy further requires, however, that this property damage "be caused by an occurrence." "Occurrence," in turn, is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Coverage is expressly excluded for property damage to "[t]hat particular part of any property that must be restored, repaired or replaced because [King's] work was incorrectly performed on it." This exclusion is inapplicable, however, to "property damage included in the products-completed operations hazard" coverage. The PCOH coverage extends to "property damage occurring away from premises [King] own[s] or rent[s] and arising out of . . . [King's] work," provided that the work has been "completed or abandoned." Work is deemed completed, *inter alia*, "[w]hen that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project." Furthermore, "[w]ork that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed."

The roads at Peach Brook Farms are clearly in use, and in any event, King has clearly abandoned his work at that site. Since "property damage" is insured, however, only when "caused by an occurrence," i.e., an "accident," the central issue on this appeal is whether the damage to the roads at Peach Brook Farms resulted from an "accident." The district court concluded that it did, stating:

> The errors made by King were accidental to the extent that he did not intend to build the roads in the wrong place at the wrong elevations. It was not an accident, however, in the popular use of the word

as a single event. We conclude, albeit with some uncertainty, that what occurred here qualifies as an "occurrence."

In this diversity action, this conclusion must be tested by reference to New York law. The leading case is *Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 133 N.E. 432 (1921). In that case, the insured entrusted his automobile to an underage driver who was involved in a collision. Although the lending was intentional, the ensuing collision was deemed an "accident." As the court explained: "The character of the liability is not to be determined by analyzing the constituent acts which, in combination, make up the transaction, and viewing them distributively. It is determined by the quality and purpose of the transaction as a whole." 232 N.Y. at 166, 133 N.E. at 433.

Courts have subsequently applied *Messersmith's* "transaction as a whole" test to a variety of facts. *See, e.g., Aetna Casualty & Sur. Co. v. General Time Corp.*, 704 F.2d 80, 81-83 (2d Cir. 1983) (damage to valves caused by defective motors held "accident" under New York law); *McGroarty v. Great Am. Ins. Co.*, 36 N.Y.2d 358, 361, 363-65, 329 N.E.2d 172, 173, 175, 368 N.Y.S.2d 485, 487, 489-90 (1975) (excavation on adjoining property that resulted in damage to plaintiff's building deemed accident); *Corbetta Constr. Co. v. Michigan Mut. Liab. Co.*, 20 A.D.2d 375, 380, 247 N.Y.S.2d 288, 292-93 (1st Dep't 1964) (leaks in cofferdam that resulted in damage to adjacent building constituted accident), *aff'd mem.*, 15 N.Y.2d 888, 258 N.Y.S.2d 423 (1965); *Wolk v. Royal Indem. Co.*, 27 Misc. 2d 478, 482-85, 210 N.Y.S.2d 677, 682-83 (App. Term 2d Dep't 1961) (runoff from golf course that damaged adjoining property considered accident).

In all these cases, however, the claim against the insured was not simply one for faulty workmanship, but rather for consequential property damage inflicted upon a third party as a result of the insured's activity. More recently, this circuit has held that a CGL policy did not provide coverage for a claim against an insured for the repair of faulty workmanship that damaged only the resulting work product. In *Jakobson Shipyard, Inc. v. Aetna Casualty & Sur. Co.*, 961 F.2d 387 (2d Cir. 1992), the insured shipyard built two tugboats for delivery to a barge company. *Id.* at 388. The steering mechanisms of the tugs were defective. *Id.* In affirming the district court's summary judgment denying insurance coverage, we said:

> The damages sought were for damages to the tugs themselves resulting from the defective steering mechanisms. No damage to the property or persons of third parties was alleged or proven.
>
> * * *
>
> Were we to construe the words "accident" or "continuous or repeated exposure to conditions" as encompassing damage to a product resulting from the product's failure to perform according to contract specifications, we would expand the agreed-upon coverage. An accident, given its dictionary meaning, is "an event or condition occurring by chance or arising from unknown or remote causes." *Webster's Third New International Dictionary* 11 (1981). We might add that in common parlance an external force of some kind is usually involved.

961 F.2d at 389. We distinguished our earlier decision in *General Time*, 704 F.2d at 83, on the basis that the defective motors sold by the insured in that case had caused damage to other property of the purchaser. *Jakobson*, 961 F.2d at 389-90.

The *Jakobson* ruling is consistent with the general concept of PCOH insurance, which has been described in these terms:

> The products hazard and completed operations provisions are not intended to cover damage to the insured's products or work project out of which an accident arises. The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.

Roger C. Henderson, *Insurance Protection for Products Liability And Completed Operations—What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971) (footnote omitted).

Rulings in other jurisdictions support this analysis. In *McAllister v. Peerless Ins. Co.*, 474 A.2d 1033, 1035-37 (N.H. 1984), PCOH coverage was held not to extend to the repair of faulty workmanship in constructing a leach field and performing landscaping. Noting the absence of any "claim that such defects had caused damage to any other property than the work product, . . . [or of] any damage to the work product other than the

defective workmanship," *id.* at 1035, the court stated that: "The fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship." *Id.* at 1036.

Similarly, *United States Fidelity & Guar. Corp. v. Advance Roofing & Supply Co.*, 788 P.2d 1227 (Ariz. Ct. App. 1990), *review denied*, No. CV-90-0041-PR, 1990 Ariz. LEXIS 66 (Ariz. Apr. 17, 1990), denied PCOH coverage to a roofing contractor that was sued for failure to complete work in accordance with contract requirements. The court concluded that "mere faulty workmanship, standing alone, cannot constitute an occurrence as defined in the policy, nor would the cost of repairing the defect constitute property damages." *Id.* at 1233 (citing *McAllister*). The court reasoned: "If the policy is construed as protecting a contractor against mere faulty or defective workmanship, the insurer becomes a guarantor of the insured's performance of the contract, and the policy takes on the attributes of a performance bond." *Id.*

Finally, *Hawkeye-Security Ins. Co. v. Vector Constr. Co.*, 460 N.W.2d 329 (Mich. Ct. App. 1990), barred PCOH recovery by an insured concrete contractor that was liable to a third party for the provision of defective concrete. Noting that "Vector seeks what amounts to recovery for damages done to its own work product, and not damage done to the property of someone other than the insured," *id.* at 333, the court ruled: "We agree with both the reasoning and the conclusion as expressed by the *McAllister* court. Accordingly, we hold that the defective workmanship of Vector, standing alone, was not the result of an occurrence within the meaning of the insurance contract." *Id.* at 334.

JZG seeks recovery from King only for the repair of the faulty roads that King constructed at Peach Brook Farms. Because the Policy does not provide coverage to King for this liability to JZG, Shelby is not liable to JZG for the judgment entered in favor of JZG against King.

Conclusion

The judgment of the district court is reversed as to the $300,000 award against Shelby and remanded for dismissal of the complaint as to Shelby, and otherwise affirmed in all respects. Costs to Shelby against JZG. No costs to JZG or King.

APPENDIX B

Findings of Fact and Conclusions of Law of the United States District Court

(Filed December 27, 1991)

90 Civ. 2383 (GLG)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J.Z.G. RESOURCES, INC.,
Plaintiff,

against

EDWARD E. KING, C. JAMES OSBORNE, JR., R.L.S., P.C. and SHELBY INSURANCE CO.,
Defendants.

FINDINGS OF FACTS
AND
CONCLUSIONS OF LAW

FINDINGS OF FACT

Plaintiff J.Z.G. Resources, Inc. ("JZG"), a New York corporation, owns a parcel of real property located in the Town of Southeast, Putnam County, New York, on which there is a development known as Peach Brook Farms. The subdivision was approved subject to the installation of certain roads and improvements in accordance with approved plans. Plaintiff posted a bond in the amount of $250,000 to secure said performance.

On April 27, 1988, plaintiff and Edward E. King, a Connecticut resident, entered into a contract requiring King to install three roads and storm drainage facilities in the development pursuant to specifications provided by Laurent Engineering Associates. King was engaged in the business of general contracting, including road building, primarily in the State of Connecticut. Under his contract with the plaintiff, King agreed as follows:

> 1. All work would be performed by King in conformity with contractor's plans and would meet or exceed the requirements and specifications of the town of Southeast, Putnam County and the State of New York so that the finished roadways would be accepted as public roads by the appropriate authorities.
>
> 2. King warranted and guaranteed his work for a period of one year and agreed that he would repair his work at no cost to the owner and at his sole cost and expense. He was also to be liable for legal fees incurred by plaintiff as a result of his breach of the contract.
>
> 3. King specifically acknowledged that work had been performed by others on the site and agreed that the scope of the work under this contract, included any corrective work and completion of any work previously done.
>
> 4. King agreed to obtain insurance which included, in addition to base liability coverage, products/completed operations coverage.

Shelby Insurance Company is an Ohio corporation authorized to write policies of liability insurance in the state of Connecticut. On July 30, 1988, defendant Shelby Insurance Co. issued a policy of liability insurance, #ACB-63406030005, with the named insured being "KING, EDWARD, D/B/A E. E. KING CO." for the policy period of July 30, 1988 to July 30, 1989. The

policy was cancelled by defendant Shelby Insurance Co. on December 5, 1988. A certificate of insurance had been issued to plaintiff, but it was not given notice of the cancellation of the policy.

With respect to the products/completed operations coverage, the policy provided:

> "11(a)(2) Products-completed operations hazard includes all bodily injury and property damage occurring away from premises you own or rent and arising out of your product or your work except; . . . (2) work that has not yet been completed or abandoned."

King was on site in the spring of 1988 performing work under other contracts. In July, he did some preliminary roadwork. During August and September, he cut away the top soil and removed earth, and then placed gravel down as a sub-base. In September, he was prepared to lay down the asphalt. Town officials told him he could not pave the road until its location and elevations had been checked. He was advised to have the road surveyed. The plaintiff had previously had the road surveyed in October of the previous year and in March of 1988. Because survey stakes tend to get disrupted by construction vehicles and removed by vandals, it is advisable to have a current survey before doing roadwork. Moreover, at the conclusion of earth removal and placement of rock the road location and grades should again be surveyed to make sure they are in place before the asphalt is laid since, once the asphalt is down, it is both difficult and expensive to effect repairs. Consequently, sophisticated road contractors have their own surveyors doing the necessary work. King did not have such employees and was not capable of doing the survey himself. He asked one of his occasional

employees, Rod Thibault, whether he knew of a surveyor. Thibault then solicited the assistance of his cousin, Stephen Osborne.

Stephen Osborne is not a licensed surveyor, but at the time he was an employee of C. James Osborne, Jr., R.L.S., P.C., a Connecticut corporation. Stephen Osborne agreed to come out on his own time to shoot the grades. With the assistance of Thibault, he took grades on two of the roads. However, because of the inadequacy of information available from the profiles given to him and the age and illegibility of the survey markers, he could not accurately calculate whether the grade elevations were proper and so advised King. (He had never done grade elevations before.) The survey stakes which had been left by the prior surveyor a half year and a year earlier did not contain the necessary elevation notations. This information was, however, available from cut sheets in that surveyor's possession. King did not attempt to obtain those readings. Osborne and Thibault made no attempt to check the location of the road since that would have required a map certified by a licensed surveyor. In fact, one of the roads was located eight feet too far to the east. While it was within the right-of-way, it did not leave sufficient right-of-way for the Town to snow plough the road without dumping the snow on private property.

Later, Stephen Osborne was given some of the cut sheets from the earlier years from which he determined that the grades were inaccurate. Stephen Osborne never represented to King that the roads were in place or properly graded. King had no contractual relationship whatever with C. James Osborne, Jr., P.C. Thibault and Stephen Osborne were paid a few hundred dollars in cash for their services performed on their own time. The

plaintiff had no contractual relationship with C. James Osborne, Jr., P.C. or with Stephen Osborne or Rod Thibault. C. James Osborne, Jr., the principal of the corporation, was not aware of the work being done by his relatives on their own.

The Town officials required a certification from a licensed surveyor concerning compliance of the road with the plans and profiles. A letter was obtained on the letterhead of C. James Osborne. It was not in the customary form used by that company and had a stamp seal rather than an embossed one.[1] Initially, the letter was unsigned. The Town rejected the letter. King states that he then forged the signature of C. James Osborne. The signature is clearly not Obsorne's but appears to be an attempt to imitate his signature.

The asphalt was then put down in the appropriate quantities but on the base which was partly mislocated, contained off grade elevations, and was tilted in a number of places. Because the Town required a six month wait before the top coat and the curbing could be put down, and because the asphalt plants were closing for the winter, further roadwork was put off until the spring. King was paid for the work he had done to date under his contract. He was entitled to an additional payment when the top coating and curbs were put in place.

In the spring, King came back and advised plaintiff that he had suffered substantial financial reversals and was unable to do the remaining work. Plaintiff consulted another paving contractor who brought in their own

[1] The testimony of King and Thibault as to how this letter came to be issued is in direct conflict. At least one of them committed perjury. However, a resolution of that issue is not necessary to determine the liability of C. James Osborne, Jr., P.C.

surveyor. That surveyor indicated that one road was out of place, and that the elevations were badly off for two of the roads. In addition, some of the roads were badly tilted to the side. After learning of this, the Town indicated that it would not accept the roads for public dedication, until these things were corrected. The roads, as they stood, were useable and, in fact, certificates of occupancy had been granted to about six houses that had been completed in the development. Those houses use the road and, indeed, other through traffic uses some of the roads. (The top coat of asphalt is primarily aesthetic and its absence does not prevent practical use of roads.) However, the Town will not accept the roads and take over their maintenance and ploughing until the deficiencies in the roads have been corrected.

Needless to say, the plaintiff would like to salvage as much as possible of the existing roads because the cost of removing them is expensive and whatever is removed will have to be redone. No agreement as to how much will have to be done has been reached with the Town nor does one appear likely at the moment. The easiest correction is in relocating the road which is off line since portions of it can be "wedged," *i.e.*, removing the portion which is too badly off line and repaving an equal portion on the opposite side of the road.[2] The elevations present a much more pronounced problem. Because they are off grade, they are affecting the drainage from the road—a situation which the Town engineer will not accept. Where the elevations are too high, the entire road bed, including

[2] It appears that this error occurred in part because King followed a portion of a rough construction road which had been used by other trades where some rock and gravel had been installed. However, he was advised by the plaintiff that it was his obligation to put the roads in the right place and that he could not rely on any work done by earlier contractors.

asphalt, has to be dug up and removed, a deeper cut made and new rock and asphalt put down. (It might be possible to salvage some of the gravel presently in place, but the asphalt apparently cannot be reworked.) Where the elevations are too low, the road cannot be raised simply by putting additional rock and asphalt in, since the existence of an asphalt base would create a line through which water would permeate. To put down a couple of additional feet of asphalt would be far too expensive. With a single exception, not material to the issues in this case, the drainage was properly completed for roads in their present position. However, if the grades are redone, much of the drainage may have to be relocated at an additional cost. It is, therefore, very difficult to determine what the cost will be to the plaintiff to redo the roads sufficiently to obtain Town acceptance. Plaintiff has offered estimates ranging between $321,000 to over $400,000.

CONCLUSIONS OF LAW

Plaintiff brings this action against King for breach of his contract and for negligence. It sues C. James Osborne, Jr., P.C. for negligent misrepresentation. It also sues the Shelby Insurance Company under the policy it issued for the maximum amount of the coverage, which is $300,000 per occurrence.

Defendant King negligently performed his contract, installing one road in the wrong location and having improper grades and elevations on all of the roads. He is liable to the plaintiff for the cost of removing and redoing the roads to put them in acceptable condition for acceptance by the Town. It is extremely difficult to compute these future damages. However, it is no more difficult than a jury determination as to the amount of

future damages for plaintiff suing for personal injuries. The court awards $350,000 for breach of contract and negligence by King. In addition, on the contract claim, King is also liable for attorneys' fees. Plaintiff seeks $64,547.50 in fees, based upon hourly charges of $250.00 for partners and $150.00 for associates. We find these fees to be higher than are standard in this area for attorneys of that standing. In addition, there appears to have been some escessive time expended. We, therefore, find King liable for $50,000 in attorneys' fees. Plaintiff also seeks certain disbursements. These should be included in a bill of costs.

As to defendant C. James Osborne, Jr., P.C., there is no basis for liability against that organization. The plaintiff had no privity whatever with anyone even remotely connected with that organization. The law in New York is clear that "professionals are not liable either in tort or contract absent privity." *Widett v. United States Fidelity & Guar. Co.*, 815 F.2d 885, 886 (2d Cir. 1987) (citing *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931)). Either actual privity, or the functional equivalent thereof, is necessary. Clearly, there is no actual privity between plaintiff and Stephen Osborne because Stephen Osborne's contract, if it can be denominated as such, was with King. To determine whether the functional equivalence of privity exists, plaintiff must establish three criteria: (1) awareness that the survey was to be used for a particular purpose or purposes; (2) in the furtherance of which a known party was intended to rely; and (3) some conduct by the defendant linking it to the party and evincing the defendants' understanding of the party's reliance. *Credit Alliance Corp. v. Arthur Anderson & Co.*, 65 N.Y.2d 536, 483 N.E.2d 110, 493 N.Y.S.2d 435, 443 (1985). Stephen Osborne never completed a survey or led anyone to

believe the grades were correct. C. James Osborne, Jr. was not even aware of the limited activities undertaken by Stephen Osborne.

As to the claim of negligent misrepresentation, there is no proof that C. James Osborne, Jr. or, for that matter, Stephen Osborne was responsible for the spurious document.[3] Consequently, we find in favor of the defendant C. James Osborne, Jr., P.C.

The insurance company's liability is the most difficult aspect of this case. The policy is not appropriate for a road contractor and appears to be designed for manufacturing companies. It is an absolute rabbit warren of exclusions and exceptions which defy understanding. Needless to say, all ambiguities in the policy relative to exclusions are strictly construed against the insurance policy. *Seaboard Surety Co. v. Gillette Co.*, 64 N.Y.2d 304 (1984).

The contract between plaintiff and King required King to obtain liability insurance for the benefit of plaintiff. King obtained from Shelby a policy which included Products/Completed Operations Liability Coverage, which is defined as "bodily injury and property damage occurring away from premises you own or rent and arising out of your product or your work, except: . . . (2) [w]ork that has not yet been completed or abandoned." Policy §V, ¶11(a)(2). The policy goes on to state that work will be deemed completed at the earliest

[3] Rod Thibault lived next to the surveyor's office and had access to a key. King testified that Thibault gave him the fraudulently prepared certificate on which King then forged Osborne's signature. (King pled guilty to a criminal offense in this regard.) Even assuming that Thibault was responsible for the document, this is not a basis for liability on the professional corporation's part, it being unaware of these acts.

of the following times: "(1) [w]hen all of the work called for in your contract has been completed . . . [or] (3) [w]hen that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project." Furthermore, "[w]ork that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed."

The contract between the parties required roads to be built with an adequate drainage system. In addition, King was required to obtain Town approval after the road was completed. The roads were built and are being used as described above. However, Town approval for the roads has never been obtained and the top coat has not been placed on them. The insurance company contends, therefore, that the product has not been completed and was abandoned by King. We see no significance to King's purported abandonment since the policy had been cancelled months before. The insurance company's position concerning completion is very unrealistic. They state first that, until the road has a top coating on it, it has not been completed; but to put the top coating down would simply increase the costs of removing it in order to put the roads in compliance with the approved plan. Indeed, the insurance company goes a step further and says that the product won't be completed until the roads have been accepted by the Town and dedicated to its use. Of course, if that were to occur, there could be no claim against the plaintiff as to its completed product. Moreover, obtaining an acceptance and dedication of the road involves numerous other considerations (such as title clearances and removal of encumbrances) completely unrelated to the building of

a road. The policy also specifies that the fact that the work is in need of correction, repair or replacement does not prevent it from being considered completed. Since the roads are being used for their intended purpose, we find them to be a completed product.

The insurance company argues that some work was done on the road site before its effective date of July 30, 1988. That is true, but the work done during that period was not negligently done and did not impact on the ultimate loss to the plaintiff.

A more difficult aspect of the policy coverage is that the property damage must be caused by an "occurrence" and according to the policy "occurrence means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The errors made by King were accidental to the extent that he did not intend to build the roads in the wrong place at the wrong elevations. It was not an accident, however, in the popular use of the work as a single event. We conclude, albeit with some uncertainty, that what occurred here qualifies as an "occurrence."

Shelby Insurance also argues that it cannot be held liable because of the criminal acts of King in forging a signature to the surveyor's certificate. We have previously rejected a last minute application to amend the answer to assert this defense. In any event, the error of King in constructing the roads' base had already occurred. This simply allowed him to put asphalt down on top of it and the asphalt paving *per se* was not a cause of the loss.

The only other exclusion raised by Shelby is exclusion L, which excludes "property damage to your work arising out of it or any part of it and included in

the products/completed operations hazard." The clause goes on to state that "this exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." We have a great deal of trouble comprehending precisely what this clause means. In fact, while the parties interpret this exclusion in two different ways, this court would interpret it a third way. It appears that this exclusion only applies to claims by plaintiff for damages *to King's work, i.e.,* the roads and the drainage system. Here, it does not appear as if the roads or the drainage system were damaged, only defective and mislocated. Thus, the exclusion does not seem to apply to the damages claimed by plaintiff. In any event, it is so incomprehensible as to be construed against the carrier.

Consequently, we find the defendant insurance company liable for the limit of its liability, namely, $300,000. Judgment will enter for the plaintiff accordingly.

SO ORDERED.

Dated: White Plains, N.Y.
December 27, 1991

/s/ GERARD L. GOETTEL, *U.S.D.J.*

APPENDIX C

Memorandum and Decision of the United States District Court *Re* Motion *in Limine*

(Filed December 5, 1991)

90 Civ. 2383 (GLG)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J.Z.G. RESOURCES, INC.,
Plaintiff,

against

EDWARD E. KING, C. JAMES OSBORNE, JR., R.L.S., P.C. and SHELBY INSURANCE CO.,
Defendants.

MEMORANDUM DECISION

Plaintiff moves *in limine* for an order precluding the introduction of evidence concerning certain points raised in defendant Shelby Insurance Co.'s trial brief. The basis for the motion is the claim that these defenses have been dismissed by the court or abandoned by Shelby's counsel and that, as to two of them, they were not previously raised in the pleadings. Defendant Shelby cross-moves to amend its amended answer.

The facts concerning this action are set forth at some length in this court's bench decision of August 3, 1990 and memorandum decision dated August 6, 1991. Those decisions were in response to motions for summary judgment filed by the parties.

The policy in suit is a general liability policy containing a "products/completed operations hazard" clause which permits recovery for injuries and damages incurred after completion of work. The policy itself seems not to be appropriate for the risks insured against, namely, the installation of a road and storm drainage facilities in a development. In its answer and amended answer, the insurance company asserted numerous exclusions. In its motion for summary judgment and in opposition to the plaintiff's motion for summary judgment, however, the insurance company dropped its reliance on those exclusions which were, therefore, not addressed further in the decisions of the court. Indeed, by the second motion for summary judgment, following extended discovery, the insurance company was relying on only two of those exclusions. The insurance company argues that it did not withdraw these defenses and that there was no motion to strike those defenses and, consequently, "the issues raised by these pleadings remain before the court." That might be true in state practice but it ignores the federal rules. While the summary judgment motions were not fully adjudicated, because of issues of fact, the decisions of the court determined that, in light of the lack of support from insurance company counsel on the other exclusions, the defenses based thereon appeared without substantial controversy and, therefore, were no longer in the case. Federal Rules of Civil Procedure 56(d). Consequently, the court will not consider those other exclusions in the trial of this action.

The insurance company defendant contends that some of the work done by the insured was allegedly performed prior to the effective date of the policy. Plaintiff denies this and points out that the insurance coverage commenced earlier than the time claimed by the insurance company. We doubt that this issue has much

materiality in the case since clearly most, if not all, of the defective work occurred during the period of coverage. However, we do not believe that the failure to assert this as an affirmative defense, considering that the plaintiff was not the insured, prevents defendant from asserting at this time that not all of the defective work occurred while the policy was in force.

Finally, the insurance company attempts to assert as a defense a relatively minor criminal act committed by its insured. On April 18, 1990, defendant Edward E. King pled guilty to the crime of possession of a forged instrument in the third degree. However, this forgery was not the defective performance of which plaintiff complains but, rather, a subsequent attempt to indicate compliance with local ordinances. (King maintains that it was merely the adding of a missing signature to an otherwise accurate document so that the forgery had little materiality.) In addition to the conclusion that this transaction would not seem to provide any defense to the insurance company, is the fact that it has never asserted this act as an affirmative defense, despite the fact that it has known of the guilty plea for a year and a half and, indeed, before it filed its amended answer. In attempting to overcome this defect, the insurance company now moves to amend its amended answer. This case was placed on the trial calendar some time ago and, except for the instant motion practice, would have been tried by now. Consequently, the motion to amend the answer is denied. Counsel are advised that they are on 24 hour notice to commence trial of this action.

SO ORDERED.

Dated: White Plains, N.Y.
December 5, 1991

/s/ GERARD L. GOETTEL, *U.S.D.J.*

APPENDIX D

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

(Filed July 8, 1993)

Docket No.: 92-7178(L)
92-7208
92-7210

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of July one thousand nine hundred and ninety-three.

Present:

Hon. JON O. NEWMAN
Hon. RALPH K. WINTER
Hon. J. DANIEL MAHONEY
Circuit Judges.

JZG RESOURCES, INCORPORATED,
Plaintiff-Appellee-Cross-Appellant,

v.

EDWARD F. KING, and SHELBY INSURANCE COMPANY,
Defendants-Appellants-Cross-Appellees,

C. JAMES OSBORNE, JR., and R.L.S., P.C.,
Defendants.

A petition for rehearing having been filed herein by Appellee *JZG RESOURCES, INC.*

Upon consideration by the panel thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT,

ELAINE B. GOLDSMITH, Clerk
By: /s/ CAROLYN CLARK CAMPBELL
Carolyn Clark Campbell
Chief Deputy Clerk

Supreme Court, U.S.
FILED
NOV 4 1993
OFFICE OF THE CLERK

No. 93-550

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

J.Z.G. RESOURCES, INC.,

Petitioner,

vs.

SHELBY INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit Court of Appeals properly exercised its discretion in raising, sua sponte, a companion issue concerning the Petitioner's proof of damages and whether said proof came within the Respondent's liability policy coverage.

2. Whether the Second Circuit Court of Appeals' denial of the petition for rehearing comported with Federal practice and procedure.

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No. 93-550

IN THE

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OCTOBER TERM, 1993

J.Z.G. RESOURCES, INC.,

Petitioner,

VS.

SHELBY INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE

The District Court's order in limine addressed its restrictions of proof *solely* to Shelby's defenses on the issue of liability (A.27-28). Petitioner was neither limited in the nature nor the extent of evidence concerning any property damage it sustained.

The District Court trial proceeded over a four (4) day period. Petitioner produced seven (7) witnesses in presentation of its case (Appendix AA). The trial record revealed that Petitioner's counsel had full opportunity to offer proof of all damages

resulting from the faulty road construction. Contrary to Petitioner's claim of restricted proof in the District Court, its counsel in addressing the trial Court stated his intent to offer extensive evidence on damages (Appendix AA).

> "MR. SINGER: I have the same problem. Obviously, as a plaintiff, I want to put in as much evidence as I can to corroborate my client's damage claim."
>
> (Transcript pg. 496)

Petitioner's position in the Court of Appeals was succinctly stated on page 27 in its brief (Appendix BB):

> "The case at bar, on the other hand, consists of only one claim; to wit, damages to the subdivision roads and the entire award is solely to correct the negligent construction of same. There are no other categories of damage to be apportioned."

ARGUMENT

COURT OF APPEALS MAY EXERCISE DISCRETION TO RESOLVE QUESTIONS NOT RAISED BELOW WHERE THE OPPORTUNITY TO OFFER EVIDENCE ON THE ISSUE WAS AVAILABLE IN THE DISTRICT COURT

The Supreme Court has stated that "the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the Court of Appeals, to be exercised on the facts of individual cases. We announce no general rule."

> *Singleton v. Wulff* (428 U.S. 106, 120, 96 S.Ct. 2868, 2877)

The Second Circuit Court has entertained a new argument not previously raised below (See, *Bornholdt v. Brady*, 839 F.2d 57, 68), and also declined to consider a new theory on appeal or to remand (See, *Gilbert v. Frank*, 949 F.2d, 637, 640).

In *Bornholdt*, supra, the Court stated:

> "At oral argument of this appeal, Bornholdt's counsel stated that the relation-back argument was in fact made to the district court during a conference; counsel for the Government did not deny that this had occurred but stated only that she could not remember whether or not it occurred. Plainly none of the facts pertinent to the relation-back argument is in dispute; only legal questions are at issue. In all the circumstances, we exercise our discretion, see *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976), to entertain the relation-back argument on this appeal."

In *Gilbert*, supra, the Court noted that:

> "The difficulty with Gilbert's present contention is that it was not the basis on which the case was tried in the district court.
>
> . . . . . .
>
> The issue not having been pursued by Gilbert in the district court and the court having conducted a seven-day trial on the case as Gilbert did present it, we decline to consider his new theory here or to remand to permit the case to be retried on that theory."

In this case, Petitioner had the opportunity and intent to marshal all evidence to prove its damages. Petitioner tried its case to recover damages resulting from faulty road construction. This position was reaffirmed in its brief on appeal.

Petitioner's attempt to reframe and re-litigate its damage claim should be rejected and the request for a remand denied.

CONCLUSION

By reason of the foregoing, Respondent requests that this Court deny the Petition for a Writ of Certiorari to review the Judgment of the Second Circuit Court of Appeals.

Respectfully Submitted,

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APPENDIX AA

APPENDIX AA

Excerpt from Trial Transcript Volume on Appeal Record in Second Circuit

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United States Court of Appeals
for the
Second Circuit

JZG RESOURCES, INCORPORATED,

Plaintiff-Appellee-Cross-Appellant,

– against –

EDWARD F. KING, and
SHELBY INSURANCE COMPANY,

Defendants-Appellants-Cross-Appellees,

C. JAMES OSBORNE, JR., and R.L.S., P.C.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

TRANSCRIPT VOLUME

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The following excerpt is taken from page 496 of the Trial Transcript Volume on Appeal Record in the Court of Appeals below:

> "MR. SINGER: I have the same problem. Obviously, as a plaintiff, I want to put in as much evidence as I can to corroborate my client's damage claim."

APPENDIX BB

APPENDIX BB

Excerpt from Petitioner's Brief in the Second Circuit

United States Court of Appeals
for the
Second Circuit

JZG RESOURCES, INCORPORATED,

Plaintiff-Appellee-Cross-Appellant,

– against –

EDWARD F. KING, and
SHELBY INSURANCE COMPANY,

Defendants-Appellants-Cross-Appellees,

C. JAMES OSBORNE, JR., and R.L.S., P.C.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE-CROSS-APPELLANT

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The following excerpt is taken from page 27 of the Petitioner's Brief in the Court of Appeals below:

> "The case at bar, on the other hand, consists of only one claim; to wit, damages to the subdivision roads and the entire award is solely to correct the negligent construction of same. There are no other categories of damage to be apportioned."